# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

**No. 36**

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WONG SUN and JAMES WAH TOY,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## SUPPLEMENTAL BRIEF FOR PETITIONERS

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Present counsel for petitioners, having been appointed by this Court subsequent to the filing of petitioners' brief on the merits, submits this supplemental brief for two purposes. First, while subscribing to the position and authorities set forth in petitioners' original brief, present counsel believes that he may facilitate his oral presentation of the case by outlining in this supplemental brief his views upon the posture in which the points are presented by this record. Insofar as feasible the supplemental brief will avoid repetition of the discussion and citations contained in the original brief, though these will of course be relied upon at oral argument. The second purpose of the supplemental brief is to amplify, by specific reference

to petitioners' statements, the discussion at pp. 28-30 of the original brief on the question of whether these statements together with the corroborative evidence were sufficient to sustain the convictions. The statements were not transmitted with the rest of the record from the court below and hence do not appear in the printed transcript of record prepared for this Court. The statements were subsequently transmitted to this Court and are printed as an appendix to this brief.

## Questions Presented

In the view of present counsel the precise questions presented for decision upon this record may be stated as follows:[1]

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[1] These questions, it is submitted, are fairly contained within the questions presented in the Petition for Certiorari. Those questions were as follows:

"1. May federal agents avail themselves of knowledge obtained by them from statements made by a defendant following an illegal arrest? Is the use of such knowledge by the federal agents and the admission in evidence against the defendants of narcotics found by the agents as the result of the knowledge thus gained by them, a violation of the 'fruit of the poisonous tree' doctrine laid down by the United States Supreme Court in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 40 S. Ct. 182, and *Nardone* v. *United States*, 308 U.S. 338, 60 S. Ct. 266?

"2. May the Government use in its prosecution against a defendant illegally arrested a confession made by the defendant following such an illegal arrest?

"3. Is such a confession sufficiently corroborated by the defendant's statements made in his premises to the federal agents immediately after his arrest and evidence of narcotics found in another person's home by the agents as the result of knowledge obtained by them from such statements?

"4. Is a search for and seizure of narcotics at a place distant from the place of arrest authorized?". (Pet. 2-3.)

The grant of certiorari (R. 147) was not limited.

1. Do the Fourth and Fifth Amendments require, or should this Court in the exercise of its supervisory powers require, the exclusion of any or all of the following items of evidence obtained through the invasion of petitioners' premises and the arrest of petitioners without probable cause:

(a) An incriminating declaration made by petitioner Wah Toy to narcotics agents at the time of his illegal arrest.

(b) Narcotics obtained by the agents from the home of the alleged co-conspirator Yee as a result of information contained in Wah Toy's incriminating declaration.

(c) Incriminating statements, alleged to constitute confessions, obtained as a result of narcotic agents' interviews with petitioners subsequent to their unlawful arrests, where there has been no showing by the government that the statements were not the product of the unlawful arrests or of information obtained thereby.

2. (a) Was petitioner Wah Toy entitled to a judgment of acquittal on the charge that on or about June 1, 1959 he knowingly transported and concealed heroin with knowledge that it had been illegally imported, because the statement alleged to constitute his confession omitted, and the corroborative evidence did not supply, three elements of the offense charged: that the transportation and concealment of heroin was knowing, that petitioner had knowledge of the illegal importation (or possession from which such knowledge might be statutorily presumed), and that the act of transportation and concealment took place on or about June 1, 1959.

(b) Was the petitioner Wong Sun entitled to a judgment of acquittal on the same charge, because the statement

alleged to constitute his confession did not admit knowledge that the heroin had been illegally imported and the corroborative evidence did not establish such knowledge (or the possession from which it might be statutorily presumed), and the heroin whose concealment was relied upon to corroborate the alleged confession was not shown to be the same heroin which the statement described.

## ARGUMENT

### I.

### Declarations, Tangible Evidence and Alleged Confessions Obtained as a Result of the Violation of Fourth Amendment Rights Should Have Been Excluded From Evidence.

Each of the petitioners was subjected to three distinct violations of his Fourth Amendment rights. The amendment guarantees the security of his person, his dwelling, and his effects.[2] Each of these three guarantees was violated as to each of the petitioners. Petitioner Wah Toy's premises[3] were invaded (R. 37-39, 51-53) without a warrant or probable cause, he was arrested (R. 47, 52-53, 65) without a warrant or probable cause, and his premises were searched (R. 47, 65-66) without a warrant or incident to a valid arrest. Similarly petitioner Wong Sun's premises were invaded (R. 81-89, 96-99) without a warrant or probable cause, he was arrested (R. 84, 88, 97) without a warrant or probable cause, and his premises were searched (R. 85, 89, 99) without a warrant or incident to

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[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U. S. CONST. amend. IV.

[3] Wah Toy's premises included both a store and a dwelling (R. 33, 37, 42-43). The agents entered through the store and continued into the dwelling (R. 51-52).

a valid arrest.[4] Of these six violations of petitioners' Fourth Amendment rights, three are significant here because of the evidence obtained by the government as a result thereof. Those three are the invasion of petitioner Wah Toy's premises, the unconstitutional seizure of his person accomplished by placing him under arrest without warrant or probable cause, and the similarly unlawful seizure of petitioner Wong Sun's person. As a result of the first two of these violations, government agents obtained an incriminating declaration from Wah Toy that he had seen narcotics at Johnny's house the night before (R. 63), and acting upon such information the government obtained the narcotics from the alleged co-conspirator Johnny Yee (R. 63-64). Both Wah Toy's declaration and the narcotics themselves were admitted into evidence over objection (R. 31-33, 62-64, 100-106). The second of the violations, i.e., the unlawful seizure of Wah Toy's person, also resulted in the government's obtaining from him a statement alleged to constitute a confession (Gov. Ex. 3, App. 27-28, *infra*). Similarly the third violation, i.e., the unlawful seizure of Wong Sun's person (which itself was the result of information obtained through Wah Toy's unlawful arrest, see R. 90-96), resulted in the government's obtaining a statement alleged to constitute a confession by Wong Sun (Gov. Ex. 4, App. 29-30, *infra*). Both statements were admitted into evidence over objection (R. 100-106).

The foregoing contention, that the arrest of each petitioner without warrant or probable cause constituted a "seizure" of the person in violation of the Fourth Amendment, may call for slight elaboration. While it is a familiar concept that the Fourth Amendment prohibits unlawful

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[4] In the case of both petitioners the absence of search and arrest warrants was conceded (R. 55, 89); the want of probable cause was established by the holding of the Court of Appeals (R. 139-40).

invasion of houses and seizure of effects, it is less common to characterize an unlawful arrest as a "seizure" of the person in violation of the Fourth Amendment. Protection against such seizure, however, is patently as important an object of the Fourth Amendment as the protection of houses and effects, and is so recognized by the decisions of this Court. In *Giordenello* v. *United States*, 357 U.S. 480, 485-86, the Court held that an arrest with a warrant issued without probable cause constituted a violation of the Fourth Amendment. The *a fortiori* proposition, that an arrest without a warrant and without probable cause constitutes a Fourth Amendment violation, is established by *Henry* v. *United States*, 361 U.S. 98, 100-102. See also *Monroe* v. *Pape*, 365 U.S. 167, 170-71. The Fourth Amendment quite literally proscribes unlawful seizure of the person.[5] "The Amendment protects people against the seizure of their persons as well as against the search of their houses." *Wrightson* v. *United States*, 222 F. 2d 556, 559 (D.C. Cir. 1955), per Prettyman, *J.* "The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative." *Bynum* v. *United States*, 262 F. 2d 465, 467 (D.C. Cir. 1958), per Hastie, *J.*, sitting by designation. See also *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 693 (D.C. Cir. 1940) (police officers violated defendant's Fourth Amendment rights "by unlawfully coming into his home and by placing him in custody"), per Vinson, *J.*, as he then was.

Both *Giordenello* and *Henry*, *supra*, presented the common situation where the existence of probable cause for an arrest is in issue because the government seeks to

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[5] The Amendment in terms guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures" and requires that a warrant particularly describe "the persons or things to be seized."

validate a successful search as incident to the arrest. Those cases, unlike the instant one, present no question of excluding the fruits of an unlawful arrest as such; once the arrest is held invalid the disputed evidence must be excluded as the fruits of an unconstitutional search. The instant case, however, presents the situation where searches incident to arrests do not themselves yield fruits, while the arrests do. The question is therefore whether products of an arrest, rather than of a search incident thereto, should be excluded from evidence.

To the extent that the government in the instant case obtained evidence as a result of the violation of petitioners' Fourth Amendment rights to be secure in their persons and their homes, the exclusion of such evidence is constitutionally[6] required under *Mapp* v. *Ohio*, 367 U.S. 643.

> "'. . . [T]he Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction *if obtained by government officers through a violation of the Amendment.*'" *Id.* at 649, quoting discussion in *Olmstead* v. *United States*, 277 U.S. 438, 462 of the rule of *Weeks* v. *United States*, 232 U.S. 383. (Emphasis supplied.)

Even if the Court should decide in the instant case that the obtaining of any of the challenged evidence was not so causally related to the Fourth Amendment violations that it can be deemed "obtained by government officers through a violation of the Amendment", the Court may nevertheless exclude it in the exercise of its supervisory powers. The exercise of such powers over the conduct of

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[6] The opinion of Justice Clark in *Mapp* v. *Ohio*, *supra*, rests the federal exclusionary requirement primarily upon the Fourth Amendment, partially upon the Fifth. The concurring opinion of Justice Black stresses the interrelationship of the Fourth and Fifth Amendment grounds.

federal law enforcement officers, *cf. Rea* v. *United States*, 350 U.S. 214, *Mallory* v. *United States*, 354 U.S. 449, may make such exclusion a proper sanction to deter the practice of unlawful arrest. The evidence here challenged would not have been obtained without the violation of the requirements for arrest prescribed by Congress in 26 U.S.C. § 7607, as well as those of the Fourth Amendment.[7]

> "... [I]n *McNabb* v. *United States*, 318 U.S. 332 ... it was held that 'a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' 318 U.S., at 345. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins* v. *United States*, 364 U.S. 206, 223.

The rationale of the exclusionary rule has been extensively discussed in petitioners' previous brief, and need not be further elaborated here. For a far-ranging discussion with special reference to the unlawful arrest problem, see Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, U. ILL. L. F. (1961) 78-147.

There remains to consider with respect to each of the items of evidence here challenged, whether it was evidence "obtained by government officers through a violation of the [Fourth] Amendment" so as to require its exclusion under

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[7] *Henry* v. *United States*, *supra*, equates with the constitutional requirement of probable cause the statutory requirement that an arrest without warrant be upon "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony, 18 U.S.C. § 3052. The quoted statutory phraseology also appears in 26 U.S.C. § 7607, the statute pursuant to which the arresting agents purported to act in the instant case.

*Mapp*, or alternatively was sufficiently the product of unlawful conduct by government agents to warrant its exclusion in the exercise of the Court's supervisory powers.

1. *The incriminating declaration by petitioner Wah Toy at the time of his illegal arrest.*

The government proved through the testimony of agent Nickoloff that, when Wah Toy was placed under arrest and first questioned by agent Casey, Wah Toy stated that he knew somebody who had been selling narcotics. Wah Toy named this person as "Johnny", described the location of Johnny's house and bedroom, said that he had been there the night before and that Johnny had "about a piece" of "stuff" (R. 63). This evidence as to petitioner Wah Toy's declaration was obtained by agent Nickoloff immediately after the unlawful invasion of petitioner's premises and the placing of petitioner under unlawful arrest. Nickoloff's presence and petitioner's availability for questioning both having resulted from Fourth Amendment violations, the declaration must reasonably be considered evidence "obtained by government officers through a violation of the Amendment". Nor can it be contended any longer that oral declarations are not within the Fourth Amendment's protection against unlawful "seizure". Any doubt on this point was resolved by this Court's decision in *Silverman* v. *United States*, 365 U.S. 505.

An incriminating declaration secured under similar circumstances, by police officers who unlawfully entered defendant's home and placed him in custody,[8] was held inadmissible on Fourth Amendment grounds in *Nuslein* v. *District of Columbia*, *supra*. See also *Rickards* v. *State*,

[8] It appears from the opinion in *Nuslein* that the incriminating declaration was made after the officers' unlawful entry but before they placed the defendant in custody. See 115 F. 2d at 691.

6 Terry 573, 77 A. 2d 199 (1950), the case in which the Supreme Court of Delaware adopted the federal exclusionary rule. In *Rickards* the defendant had been illegally arrested, in violation of a State constitutional guarantee substantially the same as the federal Fourth Amendment, and was convicted of drunken driving with the aid of police officers' testimony as to declarations made by the defendant while under unlawful arrest. The conviction was reversed and the evidence held inadmissible because "obtained by a violation of constitutional guarantees". Cf. *Bynum* v. *United States*, *supra*, where in order to impose "effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention" (*id.* at 469), the court required exclusion from evidence of fingerprints taken from defendant when he was booked immediately after an unlawful arrest.

Neither the opinion below nor the government's Brief in Opposition to Certiorari specifically discusses the admissibility in evidence of the foregoing declaration of Wah Toy. Both discuss the declaration in the context of whether the government's use of the information which it contained in discovering the narcotics (Gov. Ex. 1) rendered the latter inadmissible. (R. 141-42; Brief in Opposition to Certiorari, pp. 7-8.) The validity of the government's argument on this point is considered in subsection 2, *infra*. But even if the narcotics be held admissible notwithstanding the government's use of the "lead" contained in the declaration, petitioners submit that the testimony as to the contents of the declaration should still have been excluded as the product of Fourth Amendment violations.

The improper admission into evidence of Wah Toy's post-arrest declaration in itself requires reversal of the convictions herein. The declaration was admitted as evidence on the merits (R. 62-63), not on the voir dire to

determine the admissibility of the seized narcotics. The declaration was relied upon as corroborative evidence of the alleged confessions by the court below (R. 143) and in the Brief in Opposition to Certiorari, p. 5. It appears also to have been a material factor in the verdict of the trial court, for it was cited by the prosecutor (R. 116-117) in the course of the argument which led the court (R. 118) to reverse its previously expressed view: "I think this evidence does not go to prove the substantive offense as charged." (R. 107.)[9]

Since the declaration was apparently considered as corroborative evidence against Wong Sun as well as Wah Toy,[10] its erroneous admission requires the reversal of both convictions.

2. *Tangible evidence found as a result of Wah Toy's declaration.*

The narcotics (Gov. Ex. 1) which constituted the principal evidence relied upon to corroborate petitioners' al-

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[9] The reversal of position on the substantive count (count 2) was accompanied by a reversal in the opposite direction on the conspiracy count (count 1). The court expressed the intention to find the defendants guilty of the conspiracy (R. 107), but apparently was persuaded by the prosecutor's subsequent argument that the sufficiency of the evidence on that count was more questionable than on the substantive count (R. 107-108, 118).

[10] Neither the opinion below (R. 143) nor the prosecutor's argument (R. 116-17) suggests that the declaration was to be considered only against Wah Toy. Nor was its use so restricted when admitted (R. 62-63). The Brief in Opposition to Certiorari relies on the declaration as corroborative evidence for both petitioners' confessions:

> "The finding of the narcotics in Yee's house (to which petitioners admitted bringing them) *and in the exact place where Toy said they would be*, corroborated *petitioners'* admissions that they had transported and possessed the narcotics." *Id.* at 5. (Emphasis supplied.)

leged confessions, were obtained by narcotics agents from the alleged co-conspirator Yee as a result of the information given to the agents by Wah Toy's declaration immediately after his illegal arrest. The question is presented whether narcotics so obtained are inadmissible under the "fruit of the poisonous tree" principle.

Here, unlike some "fruit of the poisonous tree" cases, there is no contention that the government may have learned of the challenged evidence from an independent source rather than from the unlawfully obtained information. The government has frankly conceded: "The narcotics found in Yee's house which corroborate the confessions were discovered as a result of statements made by Toy at the time of his arrest." (Brief in Opposition to Certiorari, p. 6.) Similarly the prosecution stated below: "We would not have found these drugs except that Mr. Toy helped us to." (R. 117.) If, therefore, Wah Toy's revealing declaration was obtained through a violation of the Fourth Amendment, the narcotics should be held inadmissible because they were concededly the "fruit" of this unlawfully obtained information. Cf. *Nardone* v. *United States*, 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385.

The government, however, argues that the narcotics cannot "be considered so directly the fruits of the illegal arrest as to be inadmissible in evidence." (Brief in Opposition to Certiorari, pp. 7-8.) The government reasons that Wah Toy's statement to the arresting agents was "an intervening act of will by the arrested person", and that "before the narcotics were obtained by the agent there was, in addition to Toy's statement, the further intervening voluntary act of Yee in turning over the narcotics." (*Id.*

at p. 8.)[11] Even assuming that there would be validity to the government's theory that intervening voluntary declarations or acts may purify the fruits of the original unlawful arrest, no such finding of voluntariness was[12] or can be made on this record. The burden upon the government to show that Wah Toy's declaration while under illegal arrest was voluntary can be no less than the burden which the government assumes when it seeks to show a waiver of Fourth Amendment rights by one under arrest voluntarily consenting to a search. The burden in the latter situation has been stated as follows by the court below, following the leading case of *Judd* v. *United States*, 190 F. 2d 649 (D.C. Cir. 1951):

> "A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied. *The Government has the burden of proving by clear and positive evidence that such consent was given.* Judd v. United States, 89 U.S. App. D.C. 64, 190 F. 2d 649, 650." *Channel* v. *United States*, 285 F. 2d 217, 219-20 (9th Cir. 1960). (Emphasis supplied.)

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[11] A similar rationale was adopted by the court below in rejecting appellants' reliance upon the "fruit of the poisonous tree" doctrine (R. 141-42).

[12] Since the government's present theory was not urged in the trial court, and the trier of fact apparently rejected the contention that the invasion of Wah Toy's premises and his arrest were unlawful, he presumably found it unnecessary to make findings on the voluntariness of the post-arrest declaration. Even if the trier of fact had affirmatively found that Toy made his declaration voluntarily, the finding would have to be reconsidered because of its failure to take into account the coercive factor of unlawful arrest.

In *Judd, supra*, the court also stated:

> "Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent.
>
> "*This burden on the Government is particularly heavy in cases where the individual is under arrest.* Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found." 190 F. 2d at 651. (Emphasis supplied.)

When as in the instant case defendant is not merely under arrest but under unlawful arrest or detention, the consent may be deemed involuntary as a matter of law even if the government can meet the heavy burden imposed by *Judd, supra*. See *Watson* v. *United States*, 249 F. 2d 106 (D.C. Cir. 1957), where the *Judd* court held it unnecessary to determine whether the government had met its burden on showing voluntary consent because the fact that the consent was obtained while defendant was under unlawful detention rendered the consent involuntary as a matter of law. See also *United States* v. *Dixon*, 117 F. Supp. 925 (N.D. Cal. 1949), in which the same district court that tried the instant case held invalid as a matter of law a consent obtained while defendant was under illegal arrest.

The second half of the government's argument on "intervening voluntary acts", viz. that Yee surrendered the narcotics voluntarily, likewise founders on the foregoing test of *Channel* and *Judd*. The conclusionary testimony of the narcotics agent that Yee "surrendered" the narcotics (R. 64, 90) is hardly sufficient to meet the burden imposed under *Channel* and *Judd* where the government contends that submission to a search and seizure was voluntary.

More fundamental than the lack of record support for the government's theory on "interveping voluntary acts" is the erroneous interpretation of the "fruit of the poisonous tree" doctrine which the government's theory appears to assume. The government apparently regards the applicable test in applying the "fruit of the poisonous tree" concept as whether the challenged evidence "can be considered so directly the fruits of the illegal arrest as to be inadmissible in evidence" (Brief in Opposition to Certiorari, pp. 7-8). But the established test is not one of directness versus indirectness of causation. Rather, once the defendant has shown that the government unlawfully obtained information, then "the burden falls upon the prosecution to prove that the information so gained has not led, *directly or indirectly*, to the discovery of any of the evidence which it introduces." *United States* v. *Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950), certiorari denied, 342 U.S. 920. (Emphasis supplied.)

> "Here, as in the Silverthorne Case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. 251 U.S. 385, 392." *Nardone* v. *United States*, 308 U.S. 338, 341.

In order to present admissible proof of the facts of which knowledge was improperly obtained, *Nardone* requires that the government "convince the trial court that its proof had an independent origin." *Ibid.* In the instant case it appears conceded that no such independent origin was or could have been shown.

Petitioners believe that the "fruit of the poisonous tree" principle applied to violations of the wiretapping statute

must apply with at least equal force to violations of the Fourth Amendment. *Nardone's* reliance on *Silverthorne*, a Fourth Amendment case, strongly suggests that this belief is warranted. In *Silverthorne*, *supra*, this Court held invalid under the Fourth Amendment a subpoena for documents of whose existence the government had learned by means of a previous unreasonable search and seizure. Although the subpoena appeared valid on its face, it was struck down because

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. . . . the knowledge gained by the government's own wrong cannot be used by it in the way proposed." 251 U.S. at 392.

Assuming *arguendo* that the government's seizure of the narcotics from Yee was predicated upon the latter's voluntary consent, the government's position can be no stronger than if it had instead used the information obtained from Wah Toy to secure a search warrant for Yee's premises. Such a warrant would be analogous to the subpoena held invalid in *Silverthorne*: here too the government would have been using knowledge obtained through a previous violation of the Fourth Amendment to secure ostensibly legal process for seizing the evidence of which it had improperly learned.

Since the narcotics should have been excluded from evidence as the "fruit of the poisonous tree", there was insufficient admissible evidence to corroborate petitioners' alleged confessions and they were entitled as a matter of law to judgment of acquittal on count 2.

3. *The alleged confessions of petitioners.*

A similar application of the "fruit of the poisonous tree" principle requires the exclusion from evidence of the statements which were alleged to constitute petitioners' confessions. Agent William Wong testified that he had prepared the statements from discussions with Wah Toy on June 5 and 9 and with Wong Sun on June 9 (R. 66-72). Wong stated that each of the petitioners had acknowledged that the information contained in his statement was true but had refused to sign it (R. 69-70, 72). The statements thus prepared by agent Wong were the result of the information and evidence obtained through the previous Fourth Amendment violations. Agent Wong testified that his conversation with Wah Toy concerned the specific narcotics which the government had obtained from Yee and introduced as Exhibit 1 at trial (R. 66-67). If, as argued above, these narcotics were unlawfully obtained, the petitioners' subsequent statements to agent Wong about the narcotics were fruits of the same illegal conduct. It would undermine the purpose and effect of the exclusionary rule to bar the narcotics from evidence but admit the agent's testimony as to petitioners' statements concerning the narcotics.[13]

There can be little doubt that, in interviewing petitioners, agent Wong[14] also made use of the information which had been obtained from petitioners during their

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[13] It may, however, be found unnecessary to determine this issue, since the exclusion of the narcotics would leave the statements without essential corroborative evidence.

[14] Agent Nickoloff was present with agent Wong at at least one of the interviews (see R. 71). Agent Wong is not to be confused with petitioner Wong Sun, nor with another agent having the same last name, Alton Wong, whose testimony appears at R. 51-53.

period of unlawful arrest.[15] However, since the government was permitted to put the unsigned statements themselves in evidence, instead of eliciting the full conversation which agent Wong claimed to have had with the petitioners, the full contents of such conversations are not in the record.[16] Apart from the agent's use of illegally obtained information and evidence in preparing petitioners' statements, such statements are "fruit of the poisonous tree" in an even more direct sense. Had it not been for the unlawful seizure of petitioners' persons, they would never have been subjected to the interviews at all. *Bynum* v. *United States, supra,* is authority that evidence which would not have been obtained but for an unlawful arrest must be excluded. In *Bynum* this evidence consisted of a set of fingerprints taken during the period of illegal arrest, and its admission was held reversible error notwithstanding that the gov rnment had other sets of By-

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[15] The record indicates that on the morning of his arrest (June 4) Wah Toy was questioned both at his home (R. 63, 94) and at the Narcotics Bureau offices (R. 90-91, 94), and was then taken with the agents to point out Wong Sun's house (R. 92-93, 95). Information obtained from Wah Toy by agents on any or all of these occasions may have been used at the interviews on June 5 and June 9. The record does not show the extent if any to which Wong Sun was questioned at or after his arrest on June 4, but there was presumably opportunity to question him during the hour he was kept handcuffed in the living roo . while agents searched the premises following his arrest (see R. 84-85, 88-9 ).

[16] The court below held: "While this does not appe r to be the usual method of introducing statements of defendants, we cannot say that the defendants were prejudiced thereby." (R. 143.) Petitioners will nevertheless have been prejudiced by the unusual procedure if the absence of the full conversation from the record prevents them from contending that such conversation must have included references by the questioner to information obtained during petitioners' unlawful arrest. But it is petitioners' position that the government has the burden of proving the absence of such references in order to render the statements admissible.

num's fingerprints which it could have introduced instead.[17] In view of the absence from this record of any evidence that the government would have sought and succeeded in obtaining interviews with petitioners absent their unlawful arrest, the government has not met the *Nardone* requirement that it "convince the trial court that its proof had an independent origin."[18]

Since the government's case concededly rested primarily upon the alleged confessions (Brief in Opposition to Certiorari, p. 5), their exclusion would have compelled judgments of acquittal on count 2.

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[17] It may be observed that a usable set of fingerprints could probably not have been obtained from Bynum without cooperation on his part. The voluntariness of the arrestee's conduct did not avoid the application of the exclusionary rule.

[18] The government did not even attempt to show that the status of illegal arrest was terminated at some time prior to the interviews by bringing petitioners before a commissioner in accordance with the requirements of Rule 5, Fed. R. Crim. P., and securing a determination from the commissioner that there was probable cause to warrant their continued detention. The record is silent as to the time or substance of any proceedings before the commissioner. This is not a situation where a defendant, seeking to invoke the *McNabb-Mallory* rule, has the burden of showing delay in his appearance before the commissioner in order to claim that an initially legal detention subsequently became illegal because of a violation of Rule 5. Here the petitioners have established that their detention was illegal *ab initio*, and it was for the government to mitigate the effect of this showing, if it was so disposed, by attempting to prove compliance with Rule 5.

## II.

**The Alleged Confessions and the Corroborative Evidence Were Insufficient to Sustain the Convictions.**

Even assuming the government's evidence all to have been admissible, petitioners submit that such evidence together with their alleged confessions was insufficient to sustain a conviction. The court below held (R. 142-43) that the convictions were sustainable under *Smith* v. *United States*, 348 U.S. 147. *Smith* held that "corroboration is necessary for all elements of the offense established by admissions alone," and that "All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' statements of the accused." *Id.* at 156, quoted at R. 142-43.

Petitioners submit that the convictions cannot stand under the standard prescribed by *Smith*, and further that an even stricter standard is properly applicable to the statements relied upon by the government in the instant case. In *Smith* the statement introduced against the defendant was a signed work product of himself and his accountant, prepared without any assistance of federal agents. In the instant case, petitioners' statements were admittedly the work product of a narcotics agent who prepared them on the basis of his interviews with petitioners (R. 67-72). Both petitioners refused to sign their statements (R. 69, 72), although the narcotics agent who prepared the statements testified that each petitioner acknowledged his statement to be correct (R. 69, 72). A statement prepared in this manner, petitioners contend, should require far more "bolstering" by independent evidence than a statement carefully prepared by a defendant and his professional

adviser as in *Smith*. Particularly is this the case where, as here, the statements of the petitioners are obviously conflicting. Indeed, it is difficult to perceive how the trier of fact could have convicted both petitioners primarily on the basis of their respective statements, when it is apparent from a comparison of the statements that both could not be true. Nor may an inconsistent verdict by a judge, unlike a jury, be allowed to stand. *United States v. Maybury*, 274 F. 2d 899 (2d Cir. 1960).

### A. The Statement of Petitioner Wah Toy and the Corroborative Evidence.

It seems to have been assumed by the courts below that Wah Toy's statement (Gov. Ex. 3, App. 27, *infra*) constituted a "confession" of the offense charged in count 2.[19] However, a careful reading of the statement indicates that, while undoubtedly incriminating, it does not amount to a confession of the offense charged[20] since it does not admit all the elements thereof. First, it does not admit that Toy "fraudulently" or "knowingly" transported (let alone concealed) any narcotics. It admits that Wah Toy drove Wong Sun to Yee's house on a number of occasions, and some-

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[19] Whether the statement constituted a confession to the conspiracy charged in count 1 need not be considered in view of petitioners' acquittal on that count.

[20] Count 2 charged as follows:

> "On or about June 1, 1959, in the City and County of San Francisco, State and Northern District of California, the defendants Wong Sun and James Wah Toy did fraudulently and knowingly conceal, transport and facilitate the transportation and concealment of a narcotic, to wit, heroin, then and there knowing the same to have been transported and brought into the United States contrary to law." (R. 5.)

The judgments of conviction (R. 124, 126) adjudged petitioners guilty of concealing and transporting the narcotic as charged; they did not rest upon that part of the charge which alleged facilitating transportation and concealment.

times received heroin there from Yee; but it does not say that on these trips Wah Toy knew that Wong Sun was transporting narcotics, or that Wah Toy himself knowingly transported them or in any way concealed them. Thus the element of "knowledge" (or alternatively "fraud") with respect to the transportation and concealment could not have been established by Wah Toy's statement.

A second element of the offense lacking from Wah Toy's alleged confession was knowledge that the narcotics had been illegally imported. The statement contains no admission of such knowledge, notwithstanding that the statement was prepared by a narcotics agent on the basis of his questioning of petitioner (R. 67-68) and so doubtless would have included such an admission if the agent had been able to elicit one. Nor can the element of knowledge of illegal importation be supplied by a statutory presumption arising from proof of possession, as 21 U.S.C. § 174 permits, since the statement does not say that Wah Toy ever physically possessed the heroin which was the subject of count 2. The small amount of heroin which Wah Toy admitted that Yee gave him does not appear to have been the same heroin whose transportation and concealment on or about June 1, 1959 was the subject of count 2.[21] Even if the statement could be read to admit possession of the heroin involved in count 2, there was no corroborative evidence of either Wah Toy's knowledge that the heroin was illegally imported or of his possession of the heroin.

A third element wanting in Wah Toy's statement is that of the time of the offense. The charge in count 2 is that the transportation and concealment by Wah Toy and Wong Sun took place "on or about June 1, 1959" (R. 5). In

[21] Wah Toy's statement said that Yee was Wah Toy's "connection", not vice versa. Thus Wah Toy would be receiving narcotics from Yee rather than transporting them to Yee, insofar as the statement is concerned.

view of the numerous deliveries of heroin which (if the statements should be believed) Yee appears to have received on different dates, the date of the particular delivery charged in count 2 was obviously a matter of importance. It seems apparent from the prosecutor's examination of his witness Yee, that Yee had told the government of a delivery on June 1, 1959, and that the government intended to prove the transportation and concealment incident to this delivery through the testimony of Yee. (See R. 20-22, 28-30; *cf.* R. 90.) However, Yee repudiated his previous statement to the government, testifying that he had "lied to that" when he had stated: "on Monday, June 1, 1959, prior to midnight, both James Toy and Wong Sun came to my house" (R. 30). The government claimed "surprise" at Yee's failure to testify in accordance with his previous statement (R. 28). This surprise, however, does not permit the allegation "on or about June 1, 1959" to be construed to embrace an act of transportation and concealment on "last Tuesday, May 26, 1959", the last occasion on which Wah Toy's statement admitted taking Wong Sun to Yee's house.[22] Nor can it be said that Wah Toy was being sufficiently imprecise in his statement so that May 26 might have meant "on or about June 1". The statement was based on interviews conducted only a few days after the event, on June 5 and 9, 1959 (R. 67), and the language in the statement, "last Tuesday, May 26, 1959", is plainly meant to refer to that date and no other.[23] The statement

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[22] The statement reads: "The last time I drove Wong Sun out to Yee's house was last Tuesday, May 26, 1959." (App. 27, *infra*.) The only subsequent visit to Yee's admitted by Wah Toy in the statement was on June 3, 1959. As to this visit the statement says that Wah Toy was coming to Yee's without "anything" and does not mention the accompaniment or presence of Wong Sun.

[23] This part of the statement was probably based on the June 5 interview, since the agent would not have written "last Tuesday, May 26, 1959" if the interview was on Tuesday, June 9, 1959. "Last Tuesday" would then have been June 2.

itself therefore cannot be the basis for a finding that Wah Toy transported and concealed narcotics "on or about June 1, 1959." And there was no independent evidence which showed that Wah Toy had transported narcotics to Yee's house on June 1, 1959, as it seems Yee had originally told the government.

Upon the evidence herein, the government cannot be said to have satisfied either aspect of the test laid down in *Smith* v. *United States, supra.* The requirement in *Smith,* that "All elements of the offense must be established by independent evidence or corroborated admissions . . ." was not met, because the three elements discussed above were not established either by independent evidence or corroborated (or even uncorroborated) admissions. Even if those three elements had been present in the statement, the requirement of *Smith* that "Corroboration is necessary for all elements of the offense established by admissions alone" was not satisfied. None of the three elements was corroborated by the evidence relied upon by the government and the court below.[24] The motion for judgment of acquittal on count 2 (R. 118) should therefore have been granted as to petitioner Wah Toy.

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[24] The corroborative evidence was set forth as follows by the court below (R. 143):

> "In this case the narcotic was found in the residence of Yee. This in itself establishes that someone was guilty of concealment and transportation of narcotics in violation of 21 U.S.C.A. § 174. This narcotic was introduced into evidence. The advance statement of Toy that narcotics could be expected to be found in Yee's house, and that he was familiar with that house and the place where the narcotic was stored, together with the subsequent admissions of Toy and Wong Sun that they had brought the narcotic to Yee's house, amount to sufficient evidence to support the conviction."

The government's view of the extent of the corroborative evidence appears at p. 5 of the Brief in Opposition to Certiorari.

B. The Statement of Petitioner Wong Sun and the Corroborative Evidence.

While Wong Sun's statement (Gov. Ex. 4, App. 29-30, *infra*) comes closer than Wah Toy's to constituting a confession of the offense charged in count 2, two essential elements of the offense remain uncorroborated. The statement reveals no knowledge on Wong Sun's part that the narcotics were illegally imported, although as noted above the narcotics agent taking the statement (R. 71-72) would have elicited an admission of such knowledge if he possibly could have done so. Assuming that the admission that Wong Sun briefly had possession of the narcotics which were taken to Yee's "About 4 days before" June 4, 1959, is sufficient to invoke the statutory presumption of knowledge as to the narcotics which are the subject of count 2, there is no corroborative evidence showing either the knowledge of illegal importation or the possession from which such knowledge might be presumed.[25]

There is also a serious question as to whether the finding of certain narcotics in Yee's house on June 4 corroborates Wong Sun's admission (App. 29-30, *infra*) that he accompanied Wah Toy in transporting narcotics to Yee's four days before. Since Wong Sun's statement suggests that Yee received numerous deliveries of narcotics, there are obviously alternative explanations for narcotics being found at Yee's on June 4, which are as reasonable as the explanation that Wong Sun had helped bring them there "on or about June 1". A comparison of the description by Wong Sun of the narcotics which he and Wah Toy delivered to Yee about June 1, with the government witnesses' description of the narcotics found on June 4, suggests that the latter were different from the former. Wong Sun's state-

[25] See the summary of the corroborative evidence cited in the preceding footnote.

ment described the narcotics as "one piece" (one ounce) "contained in a rubber contraceptive in a small brown paper bag." (App. 29-30, *infra.*) The narcotics found also totaled approximately one ounce (R. 19), but were contained in four rubber contraceptives plus eight bindles of paper (R. 17-19, 64). Thus the narcotics found and introduced into evidence (Gov. Ex. 1) may well have been the subject of one or more different deliveries than the narcotics which Wong Sun's statement described.

In view of the lack of corroborative evidence on at least one, and arguably two, elements of the offense, the evidence as to Wong Sun failed to meet the requirement of *Smith v. United States, supra,* that "All elements of the offense must be established by independent evidence or corroborated admissions . . ." It cannot be concluded on this record, as required by *Smith's* companion case, *Opper v. United States*, 348 U.S. 84, 93, that corroborated admissions plus the other evidence were "sufficient to find guilt beyond a reasonable doubt." The motion for judgment of acquittal on count 2 (R. 118) should therefore have been granted as to Wong Sun.

## Conclusion

For the foregoing reasons, petitioners respectfully pray that the judgments of conviction be reversed and the case remanded with directions that the district court enter judgments of acquittal.

EDWARD BENNETT WILLIAMS
(Appointed by this Court)

ROBERT L. WEINBERG

*Counsel for Petitioners*

February, 1962

## APPENDIX

### Government's Exhibit 3

Statement of JAMES WAH TOY taken on June 5, 1959, concerning his knowledge of WONG SUN's narcotic trafficking

I have known WONG SUN for about 3 months. I know him as SEA DOG which is what everyone calls him. I first met him in Marysville, California, during a Chinese holiday. I drove him back to San Francisco on that occasion. Sometimes he asks me to drive him home and to different places in San Francisco.

Sometime during April or May of this year, he asked me to drive him out to JOHNNY YEE's house, at 11th and Balboa Streets. He asked me to call JOHNNY and tell him we were coming. When we got there we went into the house and WONG SUN took a paper-package out of his pocket and put it on the table. Then both WONG SUN and JOHNNY YEE opened the package. I don't know how much heroin was in it, but I know it was more than 10 spoons. I asked them if I could have some for myself and they said yes. I took a little bit and went across the room and smoked it in a cigarette.

WONG SUN and JOHNNY YEE talked for about 10 or 15 minutes, but they were talking in low tones so that I could not hear what they were saying. I didn't see any money change hands, because I wasn't paying too much attention. WONG SUN and I then left the house and drove. I drove WONG SUN to his home and he gave me $15.00. He said the money was for driving him out there.

I have driven WONG SUN out to JOHNNY YEE's house about 5 times altogether. Each time WONG SUN gave me $10 or $15 for doing it and also, Johnny gave me a little heroin—enough to put in 3 or 4 cigarettes. The last time I drove WONG SUN out to YEE's house was last Tuesday, May 26, 1959. On Wednesday night June 3, 1959, at about 10:00 p.m., I called JOHNNY YEE and told

him that "I'm coming out pretty soon—I don't have anything". He said okay, so I drove out there. When I got there I went in the house and Johnny gave me a paper of heroin. The bindle had about enough for 5 or 6 cigarettes. I didn't give him any money and he didn't ask for any. He gives it to me just out of friendship. He has given me heroin like this quite a few times. I don't remember how many times. I have known HOM WEI about 2 or 3 years but I have never dealt in narcotics with him. I have known ED FONG about 1 year and I have never dealt in narcotics with him, either. I have heard people that I know in the Hop Sing Tong Club talk about HOM WEI dealing in narcotics but nothing about ED FONG. I do not know JOHN MOW LIM or BILL FONG. The only connection I have now is JOHNNY YEE.

I have carefully read the foregoing statement, which was made of my own free will, without promise of reward or immunity and not under duress. I have been given ample opportunity to make corrections have initialed or signed each page as evidence thereof and hereby state that this statement is true to the best of my knowledge and belief.

.....
JAMES WAH TOY

Witnessed by: Date: .....

.....
William Wong, Narcotic Agent

.....
John C. Campbell, Narcotic Agent

JAMES WAH TOY did not wish to sign this statement at this time. He stated he may change his mind at a later date. However, I read this statement to him and in addition he read it also and stated that the contents thereof were true to the best of his knowledge. Corrections made were by JAMES WAH TOY without his initials.

/s/ WILLIAM WONG
William Wong, Narcotic Agent

**Government's Exhibit 4**

STATEMENT OF WONG SUN

I met JAMES TOY approximately the middle of March, this year, at Marysville, California, during a Chinese celebration. We returned to San Francisco together and we discussed the possible sale of heroin. I told JAMES that I could get a piece of heroin for $450 from a person known as BILL.

Shortly after returning to San Francisco, JAMES told me he wanted me to get a piece. I asked him who it was for and he told me it was for JOHNNY. He gave me $450 and I obtained a piece of heroin from BILL. I did this on approximately 8 occasions, however, at least one of these times the heroin was not for JOHNNY—for another friend of JAMES TOY. JOHNNY would pay JAMES $600 for each piece.

On several occasions after I had obtained the piece for JAMES I would drive with him to JOHNNY's house, 606 11th Avenue, and we would go upstairs to the bedroom. There, all three of us would smoke some of the heroin and JAMES would give the piece to JOHNNY. I also went with JAMES on approximately 3 other occasions when he did not take any heroin and then we smoked at JOHNNY's and we would also get some for our own use.

About 4 days before I was arrested (arrested on June 4, 1959) JAMES called me at home about 7 o'clock in the evening and told me to come by. I went to the laundry and JAMES told me to get a piece. I called BILL and arranged to meet him. JAMES gave me $450 which I gave to BILL when I met him. BILL called me about one hour later at the laundry and I met him. He gave me one piece, which I gave to JAMES, and JAMES immediately thereafter called JOHNNY. We drove to 606—11th Ave. at approximately midnight and JAMES gave the piece to

JOHNNY. It was contained in a rubber contraceptive in a small brown paper bag.

Again on June 3rd, the night before I was arrested, I met JAMES at the laundry, prior to 11 o'clock in the evening, and JAMES telephoned JOHNNY at EV—6-9336. Then we went out to JOHNNY's and smoked heroin and also had one paper for our own use later. We were there approximately ½ hour and then left.

The laundry mentioned is OYE's LAUNDRY, 1733 Leavenworth Street, which is run by JAMES TOY. I do not know JOHNNY's last name and know him only through JAMES TOY. As well as the few times at JOHNNY's home, I have seen JOHNNY on a number of occasions at the laundry.

I have carefully read the foregoing statement, consisting of 2 pages which was made of my own free will, without promise of reward or immunity and not under duress. I have been given ample opportunity to make corrections, have initialed or signed each page as evidence thereof and hereby state that this statement is true to the best of my knowledge and belief.

.....

WONG SUN

Subscribed and sworn to before

me this ..... day of ..... 1959.

.....

Narcotic Agent

WONG SUN, being unable to read English, did not sign this statement. However, I read this statement to him and he stated that the contents thereof were true to the best of his knowledge.

/s/ WILLIAM WONG

William Wong, Narcotic Agent